No. 22121
No. 22121A

IN THE
# United States Court of Appeals
# For the Ninth Circuit

FOWLER MANUFACTURING COMPANY, a corporation,
*Appellant,*

v.

H. H. GORLICK and MORRIS GORELICK, co-partners, d/b/a THRIFTY SUPPLY COMPANY; THRIFTY SUPPLY CO. OF EVERETT, INC.; THRIFTY SUPPLY CO. OF SPOKANE, INC.; THRIFTY SUPPLY CO. OF TACOMA, INC.; and THRIFTY SUPPLY CO. OF YAKIMA, INC.,
*Appellees and Cross-Appellants,*

v.

HOWARD KELLER, KELLER SUPPLY COMPANY, INC., a corporation; MAX ROSEN; and NORMAN MESHER,
*Cross-Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

# BRIEF OF APPELLEES AND CROSS-APPELLANTS

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## COUNTERSTATEMENT OF THE CASE

This statement is merely intended to supplement Appellants' Statement of the Case with corrections and additions.

During the period in question in this lawsuit there were numerous manufacturers of hot water heaters who sold their products in the State of Washington market. Each of the manufacturers had their own methods of distribu-

tion. Not all water heaters were available to each wholesaler (Tr. 391 to 393). Appellant was the principal source of supply for the appellee and cross-appellee. Appellees and cross-appellees supplemented their source of supply when other hot water heaters were available.

Competition for the sale of hot water heaters was very aggressive. The price at which the hot water heaters were sold was a principal factor in making the sale (Tr. 390, 391). The appellant Fowler Manufacturing Company's practice of establishing prices at which they offered their product to the wholesalers was to issue a price bulletin. Said price bulletins were issued on each change of price. Said price bulletins indicated the price and terms and conditions under which said product was sold (St. 954, 955).

On May 10, 1960, the appellants issued a price bulletin. On June 4, 1960, the appellants issued a price bulletin substantially raising the price of the product. On June 3, 1960, the appellant Fowler by wire to its then distributors advised of the pending price rise and indicated to its then distributors that any order placed prior to June 4, 1960 despite delivery date would be accepted at the May 10, 1960 prices (Ex. 14). During the latter part of June, 1960, the appellant and cross-appellees met to discuss the purchase and sale of appellant's product to cross-appellees. That said discussions resulted in substantial simultaneous orders being placed by the cross-appellees, Keller, Mesher, and Rosen, which orders were accepted by the appellant. In conjunction with said order, appellants authorized and issued to cross-appellees a substantial credit indicated as a promotional and advertising allowance. That said promotional and advertising allow-

ance was granted arbitrarily without any criteria or any requirement therefor (St. 966 to 969). There was considerable dispute in the testimony as to the mechanics of said promotional allowance. However, the books and records of cross-appellee Keller indicated that promotional allowance was to off-set the pricing of the first 262 water heaters (Tr. 280, 284). The books and records of Mesher indicated promotional allowance was to off-set the price of the first 166 heaters (Ex. 3, 41-A, 41-B; Tr. 750).

That prior to July, 1960, the appellees, more particularly, Thrifty Supply Company, which is a partnership, had an exclusive franchise and distributorship agreement with the appellant. When said exclusive agreement was wrongfully terminated, a damage settlement was executed between the parties (Ex. 1).

## I.

## ARGUMENT IN SUPPORT OF JUDGMENT

It is admitted by appellant that the appellant Fowler Manufacturing Company is engaged in commerce, and in the course of such commerce did sell commodities of a like grade and quality to different purchasers at the same time. That the purchasers are in commerce and the commodities are sold for use in consumption or resale within the United States (Pre-trial order, admitted facts 17, 18; R. 252). Eliminating these factors from the discussion of the issues, this matter therefore is three-fold:

### (1) Was There Discrimination in Price?

Finding of Fact XII reads:

"While the Fowler Manufacturing Company issued

> price lists from time to time, established prices frequently varied from the published prices. Moreover, the plaintiffs and Fowler Manufacturing Company's co-defendants often requested the Fowler Manufacturing Company to deviate from the published price list allegedly to meet competition, and these requests were frequently granted. Often these deviations took the form of special quotes; at other times freight allowances were granted; and on other occasions special allowances in lieu of cost of delivery were made. At times the Fowler Manufacturing Company accepted protective orders and back orders—to protect the purchaser against a change in the published price list. At times Fowler would reduce prices for inventory clearances, or allow a discount for promotion of a label. The Fowler Manufacturing Company thus endeavored to meet competition to hold onto its share of the wholesale market."

That said Finding is unchallenged.

All of the testimony in this matter is such that the appellant issued periodic price lists to appellee and cross-appellees designating the prices and conditions under which the products would be offered for sale. The price offerings to appellee and cross-appellees as shown by the price lists were equal (Tr. 954, l. 19 to Tr. 955, l. 8; Tr. 1002; Tr. 1073, ll. 16-25; Tr. 1083, l. 12 to Tr. 1084, l. 10; Tr. 32, 63). All deviations from said price lists with the exception of the cash discount, the two per cent discount from December, 1961, through August, 1962, and the $1.70 freight credit from November, 1960 through February, 1961 were available to all parties.

It is true that appellees and cross-appellees availed themselves of the opportunities afforded them by the appellant in different degrees or in different quantities, but it is not denied that said opportunities were available

to both appellees and cross-appellees equally.

It is admitted by appellant and cross-appellees and as is clearly indicated by the exhibits that from December, 1960 through October, 1962, the cash discount terms, both on the price sheets and on the invoices, indicate one per cent tenth proximo. It is admitted that cross-appellees were permitted to take two per cent cash discount and that appellee was permitted only a one per cent cash discount from June 1, 1961 through August, 1962. Defendants' Exhibit A-56 offered and prepared by defendant clearly shows the cash difference in accordance with the trial court's Finding of Fact XVI. There is no showing anywhere by the appellants or cross-appellees that appellees received an off-setting discount in any manner. It must be said that appellants admitted there was a discrimination in cash discounts in preparing their comparison documents (A-53, A-55 and A-66), which excluded cash discounts (Tr. 1372). Finding of Fact XIII (R. 345, 346).

Again, as to the two per cent discount allowed cross-appellee Keller and Mesher from December, 1961 through August, 1962, it is admitted by appellants that all other things being equal cross-appellee Keller received an additional two per cent discount unsupported by cost justification or other criteria (Tr. 1060 to 1073).

Further, reference to Appellant's Exhibit A-13-B which purports to be a comparison of all credits received by appellees and cross-appellees discloses that freight rates were substantially equal. Special allowance and inventory clearances were equal. Warehouse sales and credits were equal. All other credits were equal, except cash discount

and the two per cent discount commencing December, 1961, and the $1.70 credits in November, 1960 through February, 1961.

Appellant attempted to off-set the two per cent special discount allowed cross-appellee Keller against the five per cent promotional allowance allowed appellees on Chevron. The testimony indicates that the five per cent promotional allowance was available to cross-appellees. In addition to the two per cent, the cross-appellee purchased Zenith at five per cent discount and still obtained a two per cent discount on all other products not labeled Zenith, and he purchased a Viking label at a $1.00 discount, which allowed the two per cent discount on all purchases including Viking (Ex. A-13-B; Tr. 1071, 1072, 1073, 1083, 1084).

**(2) Was the Effect of the Discrimination Such as May Be To Substantially Lessen Competition or Tend To Create a Monopoly in Any Line of Commerce or To Enjoy, Injure, Destroy or Prevent Competition?**

There is clearly no dispute that the competition for the sale of hot water heaters in the Washington market was quite aggressive. The evidence is also quite clear that the price at which the hot water heaters were sold either from the manufacturer to the wholesaler or the wholesaler to the plumber was a principal factor in making the sale (Tr. 390 to 392, 32, 240 to 241).

The trial court in its Memorandum Decision dated June 30, 1967, at page 4, stated:

> "The fact is that Fowler Manufacturing Company sold products of a like kind and quality at the same time to Keller Supply Company, Rosen and

Mesher and to plaintiffs at different prices without justification. The purchasers were competitors in a highly competitive market where small changes of purchase price could and did affect business profits and competition."

The courts have affirmed this statement in numerous decisions. In *E. Edelman & Company v. F.T.C.*, 239 F.2d 152 (7th Cir. 1956) it is stated:

"We therefore turn to the record which shows substantial discrimination in price; that the purchasers of petitioner's products sold in a market where competition was keen; . . . On the basis of the above facts the Commission found what appears reasonable and obvious; that the competitive opportunities of the less favored purchasers were injured when they had to pay substantially more for the petitioner's product than their competitors had to pay."

Also, in *Sun Oil Company,* 55 F.T.C. 955, 962 (1959), it is stated:

"It seems self-evident that where a producer is selling homogenous products, such as salt, automotive parts, or gasoline, where competition is extremely keen among retailers, and where a margin of profit or mark-up is small, a lower price to one or some such competing retailer not only 'may' but must have the affect of substantially lessening competition."

See also, *Tri-Valley Packing Assn. v. F.T.C.*, 329 F.2d 694 (9th Cir. 1964), where the Court stated:

"We need not decide whether, in order to show the price difference is substantial it must be established that it had some measurable impact on resale prices. For here there is adequate evidence the price discrimination had such an impact. There was testimony that those engaged in the resale of such products operated on a very narrow margin—so narrow, in fact, that it is essential to take advantage of the two percent discount for cash. The price discrim-

inations on the other hand range from two percent to ten percent.

"This would indicate that non-favored retailers, and retailers who purchase from non-favored wholesalers were required to maintain retail prices at least two percent higher than those favored retailers in order to realize any appreciable profit on retail sales. In view of the highly competitive nature of the business, price disparities of this kind could well endanger the ability of these merchants to compete with favored retailers."

**(3) Were the Appellees Damaged by the Course of the Conduct of Appellant?**

The trial court in its Memorandum Decision of June 30, 1967 at page 6 stated:

"Thrifty did not pay the same prices as Keller Supply Company, Mesher and Rosen for products of like kind and quality as those purchased at the same time by these competitors from Fowler Manufacturing Company. Because of the keenly competitive market, prices at which the products were purchased from the manufacturer significantly affected the re-sell price, the business which could be done, the profits which could be expected. The evidence establishes without a doubt, if not tacitly admitted by the defendants, that Thrifty did meet competition with the co-defendants and lost profit by meeting such prices at least to the extent of the difference in the cost of the water heaters sold by Thrifty and the cost of the water heaters sold by the co-defendants. If Thrifty had to pay higher prices for their purchases from Fowler than the prices which their competitors were paying at the same time for water heaters of like kind and quality, business and profits would surely be affected."

In *Bruce Juices v. American Can Company,* 330 U.S. 747, 67 Sup. Ct. 1021, 91 L.Ed. 1219, the Court stated:

"For despite petitioner's plaint on the difficulty

> of proving damages it would establish its rights to recover three times the discriminatory difference without proving more than the illegality of prices. If prices are illegally discriminatory, petitioner has been damaged, in absence of extraordinary circumstances, at least in the amount of the discrimination."

See also, *Elizabeth Arden Sales Corp. v. Gus Blass Company,* 150 F.2d 988; and *Bruce Juices v. American Can Company,* 187 F.2d 919.

Appellant in its brief, cites *Youngson v. Tidewater Oil Company,* 166 F. Supp. 146 (D.C. Ore. 1958), wherein the Court held that the plaintiff must show that the price discrimination actually diverted customers to the favored dealers, or forced plaintiff to lower his retail prices in order to compete.

There is no question as found by the Court and by the evidence that price was the sole indicia or one of the major factors affecting the sale of hot water heaters. Appellee met competition by lowering his prices to equal or beat those of his competition, cross-appellees. It is quite clear, therefore, since appellee was forced to reduce his prices to meet the competition he is damaged by a loss of gross profit at least to the extent of the amount he paid for the same product at the same time, in excess of that paid by the cross-appellees, his competitors.

Appellant makes much of the fact that appellee failed to produce price lists, sales invoices, or other records of its sales prices, but he ignores the fact that the testimony of the appellee is uncontroverted. In fact, that the trial court indicated cross-appellees "tacitly admitted" that he (appellee) lowered his prices to meet those of the competition (Tr. 32, 626, 687, 702).

## II.

## ARGUMENT IN ANSWER TO APPELLANT

### I. The Word "Price" Means "Net Price" as Used in Robinson-Patman, 15 U.S.C.A. 13(a):

We have argued and pointed out in this argument that all factors of price were considered by the trial court in arriving at its conclusion. Appellant apparently ignores the fact that with the exception of the one per cent cash discount, the two per cent discount from December, 1961 through August, 1962, the $1.70 free credit from November, 1960 through February, 1961, and the drop shipment program from September, 1961 through August, 1962, that all other prices and discounts were eaually available to appellees and cross-appellees (Ex. A-13-B; Tr. 1072, commencing l. 23 through Tr. 1073, l. 25; Tr. 1083, l. 12 through Tr. 1084, l. 10).

### II. Availability of a Similar Product Under the Same Terms and Conditions *Is a Defense* to an Alleged Violation of Section 2(a) of the Clayton Act, as Amended. (Emphasis ours.)

Appellant at no time offered evidence showing that appellees bought from appellant at a disfavored price when they could have bought from any other manufacturer at favored price. The only evidence on availability offered by appellant was testimony of Mr. Gorlick (Tr. 702, l. 19 through 713, l. 20). The only evidence in this cause concerning availability is that appellee, when access to goods at lower prices were available, availed himself of this access. By so doing, he reduced the amount of damages chargeable against appellant.

Appellant by absence of evidence, failed to present a

defense of availability. See *Wholesale Auto Supply Co. v. Hickok Mfg. Co.*, 221 F. Supp. 935 (D.C., N.J. 1963).

There is no evidence upon which appellant could reach its conclusion that appellees had a wide freedom of choice in water heaters at equally favorable or more favorable prices.

### III. Comparison of "Net Price" Extended to Appellees and Cross-Appellees Establish That None of Cross-Appellees Were Favored Over Appellees.

Error is assigned to Finding of Fact XVI. Appellant through Mr. Joy had prepared and admitted Exhibit A-56. The purpose of said exhibit was to show the difference in cost between the one per cent cash discount allowed appellee and the two per cent cash discount allowed cross-appellees. Mr. Joy testified that said difference was not considered or included in the comparisons, A-53, A-55 and A-66. This in and of itself is an admission of discrimination in cash discounts (Tr. 1371).

Appellant also assigns error to Finding of Fact XVII. References in Finding of Fact XVII refer to the facts that support same. In addition, reference is made to (Tr. 819, ll. 1061 to 1064 and l. 1074).

Appellant devotes some ten pages of his brief to discussion of comparisons supported by exhibits which were admitted for impeachment purposes only. The same comparisons were offered as additional Findings of Fact.

The trial court had the opportunity to receive the exhibits, observe the witnesses, accept or reject from consideration the testimony and/or exhibits. The trial court

in its Memorandum Decision, June 30, 1967, at page 5, stated:

> "The court further believes that in order to make several of the requested additional Findings of Fact urged by the defendants, the Court would have to rely on exhibits which were only admitted for the limited purpose of impeachment of plaintiff's evidence, and not to affirmatively prove allegations of the defendant. The court cannot find admissible evidence on which it can rely to make such additional findings."

The court further, on page 7, stated:

> "At the outset, the Court might say that it is not entirely satisfied with the record in this case, and considers that counsel has not been as helpful as they might have been in presenting a detailed and clear and cogent price comparisons. If counsel for the defendants recognized the possibility of the Court finding a violation by the defendants of Title 15, U.S.C. Section 13, and cooperated more fully with the plaintiff in the pre-trial discovery, it is probable that many of the price comparisons could have been admitted, and established by pre-trial order or established by exhibits prepared and admitted prior to trial. As it developed, the court found it necessary either to refuse or admit for limited purposes only accounting exhibits which could have substantially aided the court in reaching its decision."

See also unchallenged Finding of Fact XIII (R. 344, 345).

**IV. Price Discrimination Alone in a Highly Competitive Market, Does Not Satisfy the Requirement of Robinson-Patman to Establish Effect of Substantially Lessening or Injuring Competition.**

**V. Appellees Never Demonstrated Any Actual Damages to Their Business or Property Resulting from the Alleged Price Discrimination.**

It is submitted that both appellant's arguments IV and

V are substantially answered by appellee's argument in support of judgment.

**VI. Splitting a Cause of Action Constitutes a Bar.**

The trial court entered Finding of Fact XXI, which we quote:

> "Incorporated herein as a finding of fact is the order of the court on defendants' motion for summary judgment (document No. 31) stating that the only claims which are litigable in this action are those predicated on the Robinson-Patman Act, 15 U.S.C., Sec. 13, for the reason that plaintiffs' other alleged antitrust violations are res judicata by virtue of the judgment entered on December 3, 1964 (Exhibit A-9) against the cross-claims asserted by Gorlick in the state court action, *Fowler Manufacturing Company v. Gorlick*, Cause No. 599283, tried before the Superior Court for King County, State of Washington. Alleged violations of the state anti-trust statutes comparable to acts forbidden by the Sherman and Clayton Acts were decided adversely to Gorlick in the said state court action. Because the State of Washington has no legislation comparable to the Robinson-Patman Act affording Gorlick a remedy for alleged price discriminations, plaintiffs' claims with respect thereto were not disposed of in the state court action (see finding of fact No. XI entered December 3, 1964 by the state court—Exhibit A-8), and were properly brought before the federal court. On May 13, 1965 this court entered its order granting defendants' motion for summary judgment dismissing all matters in plaintiffs' claim predicated on the antitrust laws except that part of plaintiffs' claim predicated on the Robinson-Patman Act.",

to which no exception has been taken.

It is axiomatic from the law, that *res judicata,* estoppel by judgment or splitting of cause of action, can not apply where there is no cause of action.

Clearly, the Findings of Fact and Conclusions of Law of the Superior Court of the State of Washington for King County in Cause No. 599283 entitled *Fowler Manufacturing Company, a corporation, v. Harold Gorlick and Jane Doe Gorlick, his wife, et al.*, established unequivocally that appellees had no cause of action for Robinson-Patman violation in the state court. That in the State of Washington, the only remedy for price discrimination is pursuant to the Robinson-Patman Act, the jurisdiction for which is exclusively in the District Courts of the United States.

## CONCLUSION

After lengthy pre-trial proceedings, the trial of this cause commenced on October 6, 1966 and continued through October 26, 1966. At the conclusion of the testimony, Judge Lindberg requested that final arguments be delayed until such time as a transcript of the reporter's notes could be prepared and counsel for each side had prepared their proposed Findings of Fact and Conclusions of Law. Final arguments were to be heard from the said proposed Findings of Fact.

Counsel complied with Judge Lindberg's request, and after filing the proposed Findings of Fact, final argument was heard on April 17 and 18, 1967. The trial court on May 19, 1967 entered its Findings of Fact and Conclusions of Law. On June 12, further argument was had on Appellant's Motion to Reconsider, Motion to Make Additional Findings and Motion to Correct Findings. On June 30, the trial court entered its Memorandum Decision and entered judgment.

From this chronology of events, it is quite apparent

that the trial court took considerable pain in analyzing the numerous accounting details and numerous mathematical details in connection with this proceeding. He arrived at his decision which is supported by substantial evidence. Said judgment should be affirmed.

In connection with the affirmance of said judgment, appellee should be awarded reasonable additional attorneys' fees in connnection with the preparation of the argument of this cause pursuant to 15 U.S.C.A., 15. Counsel for appellee has expended in excess of 65 hours in analyzing the transcript and preparing its brief and said time is exclusive of the time required in connection with argument.

## CROSS-APPEAL OF APPELLEES

### Specification of Errors

1. The court erred in entering Finding of Fact XIV:

"Beginning in October, 1960 and continuing until after May 1, 1961, the Fowler Manufacturing Company granted to Keller Supply, Rosen and Mesher free delivery, freight allowances, and other allowances which were not granted to Thrifty until demands were made following plaintiffs' discovery of such allowances."

2. The court erred in entering Finding of Fact XV:

"On or about May 1, 1961, after learning of the various allowances granted Keller, Rosen and Mesher, the plaintiffs became delinquent in the payment of their account. The March and April accounts were in excess of $40,000.00, of which approximately $35,000.00 was for delinquent invoices for March. Gordon Copeland, a Fowler Manufacturing Company executive at said time, sought payment from Harold Gorlick. On May 8, 1961 payment was obtained, and simultaneously a debit memo (Exhibit 39) was issued. On the following day the Fowler Manufacturing Company issued its credit memo 321 for $4,639.69 (Exhibit A-1). Said credit memo was received by the plaintiffs and no objection or exception was taken to the terms set forth in credit memo 321.

"The credit memo does not detail the items for which the allowances were made. The credit memo was for a substantial amount and contains the following language:

" 'Credit memo to clear up all credits owed to Thrifty Supply Company, for defective merchandise, pricing errors, and any and all other claims.'

" 'The acceptance of this credit memo by Harold Gorlick on behalf of Thrifty Supply Company is in full and complete settlement of all claims.

$4,639.68'

"While plaintiffs claim they were never advised concerning the $1.70 credit allowed to Keller, Rosen and Mesher from November, 1960 through February, 1961, the evidence does not establish that this item, among others, was not included in the claims allowed in the credit memo of May 9, 1961.

"The court finds that the payment made and the credit memo issued under the circumstances as disclosed by the evidence in this case constituted an accord and satisfaction covering all claims of plaintiffs against Fowler resulting from or based upon cash discounts, free delivery, freight and all other special allowances granted Keller Supply, Rosen and Mesher, through May 9, 1961."

3. The court erred in entering Finding of Fact XVIII.

"In addition to the price discrimination found to have occurred against plaintiffs, as set forth in Findings XVI and XVII herein, there is evidence of other possible price discriminations occurring after May 9, 1961 and resulting from free delivery, freight allowances, and freight credits granted to one or more of the co-defendants, Keller Supply Company, Rosen and Mesher, by the defendant, Fowler Manufacturing Company (Exhibit 13-A). There is opposing evidence, however, that plaintiffs were allowed or were offered allowances or arrangements similar or comparable to those granted to the co-defendants, which allowances serve to offset any price discrimination suffered by plaintiffs (Exhibits A-53, A-55, A-66). Except for the price discriminations found to exist in said Findings XVI and XVII, buttressed as they are by the admissions of the defendants contained in the pretrial order, the evidence is not sufficient to support any further or additional finding of price discrimination against the plaintiffs by the defendant, Fowler Manufacturing Company."

## ARGUMENT ON CROSS-APPEAL

### I. The Court Erred in Finding That the $1.70 Credit Was Included in Credit Memo of May 9, 1961.

The trial court in Finding of Fact XIV found that the cross-appellees, Keller, Mesher and Rosen, were granted certain freight allowances from October, 1960 to May, 1961 which were not allowed cross-appellants. The court erred in the finding that said allowances were not granted to Thrifty "until demands were made following plaitiffs' discovery of such allowance."

The evidence is uncontroverted that cross-appellants did not become aware of the said allowances, and more particularly, the $1.70 allowance until the year 1963.

"Q. (By Mr. Bensussen) Did any of the Thrifty Supply Companies during the months of November and December of 1960, and January and February of 1961, receive a credit of $1.70 per water heater, per 52-gallon water heater?

"A. No.

"Q. Were you ever offered such a credit?

"A. No.

"Q. When did you first discover that such a credit had been granted?

"A. When through counsel we examined the records of the co-defendants."
(Tr. 60, l. 18 through Tr. 61, l. 4)

The records of the co-defendants (cross-appellees) were not examined until 1963 pursuant to order of the Superior Court of King County (Tr. 276, 277).

The only evidence as to what items went into the credit of $4,639.68, was the testimony of Mr. Gorlick (Tr. 577,

578). There is no evidence of any kind that the $1.70 credit allowed to Keller, Rosen and Mesher from November 1, 1960 through February, 1961 was included in that claim of $4,639.68. It could not be included because it was not known to cross-appellant Gorlick until 1963.

To constitute an accord and satisfaction, there must be a meeting of the minds of the parties upon the subject and an intention on the part of both to make such an agreement. *Meyer v. Strom*, 37 Wn.2d 818. It is axiomatic by law that in order to effect accord and satisfaction, both parties must understand the claims they are settling. In this instance, it is quite clear that cross-appellants had no knowledge concerning the $1.70 credit on May 9, 1961, and could not therefore agree to settle same.

Thrifty Supply Company was never advised concerning the allowance of $1.70 per hot water heater and never received said allowance. That during said period of time, November 1, 1960 through February, 1961, Thrifty Supply Company purchased 110 52-gallon hot water heaters at prices in excess of those sold to the cross-appellees to its damage in the amount of $867.00 (Tr. 56, l. 21; Tr. 60, ll. 18 to 25; Tr. 61; Tr. 503, ll. 1 to 9).

**II. The Court Erred in Finding of Fact XVIII by Finding that Cross-Appellant Received Credits to Offset Drop Shipment from September, 1961 through August, 1962.**

The evidence discloses that the cross-appellants and cross-appellees sold merchandise from their warehouse to their customers f.o.b. their warehouses. The effect of this is to place an additional charge for delivery from the wholesaler's warehouse to its customer. In September,

1961, the appellant Fowler Manufacturing Company entered an arrangement with the cross-appellees whereby they (Fowler Manufacturing Company) would deliver to cross-appellees' customers merchandise at no extra freight charge. Many of the deliveries were at points more distant from the original delivery point of Fowler Manufacturing Company than the warehouse of cross-appellee Keller, Mesher and Rosen (Tr. 541 through 545). This effectively permitted Keller, Mesher and Rosen to sell cheaper than Thrifty.

The evidence is clear that the drop shipment program was not available to cross-appellants from the fact that the existence of said program was denied by appellants when requested by cross-appellants (Tr. 430-440, 469-483, 1049-1058; Ex. 10, 33, 37 and 38).

Since the drop shipment program was not reflected on the price of the product at wholesale, it did not and could not appear in Ex. A-53, A-55 and A-66. The additional costs to cross-appellants conducting their business without the aid of the drop shipment was in the amount of $3,790.00 (Tr. 541 to 545; Tr. 929, l. 17 through Tr. 930, l. 9).

### III. The Court Erred in Finding That Cross-Appellees Had Violated 15 U.S.C. Sec 13(f).

In *Automatic Canteen v. F.T.C.*, 346 U.S. 61, the Court laid down certain guide lines in determining the quantative proof necessary to prove the knowledge requisite under 13(f). It stated:

> "The trade experience in a particular situation can afford a sufficient degree of knowledge to provide a basis for prosecution. By way of example, a buyer

> who knows that he buys in the same quantities as his competitor and is served by the seller in the same manner with the same amount of exertion as the other buyer, can fairly be charged with notice that substantial price difference cannot be justified."

Again, in *American News Company v. F.T.C.*, 300 F. 2d 104, the Court stated:

> "The test whether a buyer has knowledge that the payments he induces and receives are illegal was laid down for cases brought under Section 2(f) by the Supreme Court in Automatic Canteen Company —although knowledge must be proved it may not be by direct evidence; circumstantial evidence permitting the inference that petitioner knew or in the exercise of normal care would have known that his proportionality of payments is sufficient."

In light of these decisions, let us examine the course of conduct of cross-appellees, Keller, Mesher and Rosen. Evidence discloses clearly that the policy of Fowler was to issue a price list to its customer, setting out prices and terms of sale. That in the latter part of June, 1960 and the early part of July, 1960, cross-appellees jointly met with the appellant to discuss an arrangement. That price lists were in existence at that time. That the original purchase was entered by the cross-appellees and was substantially simultaneously during the week of July 15, 1960. The purchase order of Keller dated 7-11-60 (July 11, 1960) included the following statement:

> "Helen—these prices will be adjusted by a credit for advertising and promotional allowance to equalize prices on the attached pink sheet (inked in 5-10-60), with the exception of the 100 gallon units which will be credited down to a price of $55.94. This credit will apply to the next 84 units ordered also."

The purchase order of July 15, 1960 from Keller Supply

Company contained the following statement:

> "Old prices rate P.O. 5 credit in the form of promotional advertising allowance to equal 5-10-60 prices will be billed at 6-4 prices, but credited to old 5-10 prices on 50-T; 6-S; 15-5; and 52-203." (Tr. 280-284)

A similar record appears in the records of cross-appellee Mesher (Ex. 3, 41-A, B and C). Finding of Fact X (R. 343).

On October 27, 1960, appellant issued Plaintiff's Exhibit 4. However, on October 21, 1960, cross-appellee Keller issued its price list (Ex. 17) offering free freight delivery as outlined in Ex. 4. Cross-appellant did not become aware of said policy of appellant until discovering Exhibit 17 in the market place (Tr. 35-44).

Commencing November, 1960 through February, 1961, cross-appellees received $1.70 credit for a 52-gallon water heater. Credit received by Keller was directed at specific purchases. On December 8, 1960, Mesher received a credit while he purchased no water heaters (Tr. 803, 804). Cross-appellee Rosen in December, 1960, received a credit of $102.00 while he purchased no water heaters (Tr. 847 and 848).

It is admitted by appellant and cross-appellees that the cash discount rate was changed in December, 1960 from two per cent to one per cent; and further admitted that all invoices issued by appellant after December, 1960 showed a cash discount rate of one per cent. Cross-appellees admit that at all times they took and were permitted to take a two per cent cash discount contrary to every published document issued by appellant.

Commencing in December, 1961, cross-appellee Keller received an additional two per cent discount. That said discount was negotiated by cross-appellee Keller contrary to the pricing policies of appellant (Tr. 357, 362).

That cross-appellee Mesher also received a two per cent discount in addition to the cash discount which he testified was a negotiated additional discount for continuous prompt payment contrary to any policies of appellant (Tr. 814 to 818).

We submit therefore that cross-appellees knew or should have known that they were receiving a discount not warranted and which was in violation of 15 U.S.C. 13(f).

## CONCLUSION

In conclusion, it is submitted that judgment herein should be increased in the amount of $4,657.00 trebled pursuant to the error of court in entering its Finding of Fact XIV, XV, and XVIII.

It is further submitted that judgment should be amended to hold cross-appellee liable under 15 U.S.C. 13(f).

Respectfully submitted,

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## CERTIFICATE

I certify that in connection with the preparation of this brief that I have examined Rules 18, 19 and 39 of the United States Court of Appeals of the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with these rules.

EDWARD M. BENSUSSEN
*Of Attorneys for Appellees and Cross-Appellants*